

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HEATHER CHILDRES**

Claimant

VS.

**VIA CHRISTI REGIONAL MEDICAL CENTER**

Self-Insured Respondent

Docket No. 1,045,369

**ORDER**

Claimant appealed the April 9, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on August 23, 2013, in Wichita, Kansas.

**APPEARANCES**

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed not to dispute the ALJ's finding that claimant sustained a 75% work disability. They also agreed claimant's average weekly wage without fringe benefits was \$357.84, with fringe benefits was \$474.35, and that claimant was last paid fringe benefits on January 31, 2009, the last day she worked for respondent. The parties acknowledged the calculation of claimant's permanent partial disability benefits contained in the Award is not in accordance with K.S.A. 44-510e and agreed:

- Claimant is entitled to a maximum of 311.25 weeks of permanent partial disability benefits based upon a 75% work disability.
- From September 4, 2008, through January 31, 2009, based upon her 7% whole body functional impairment, claimant is entitled to 21.14 weeks of permanent partial disability benefits at the rate of \$238.57 per week, or \$5,043.37.
- From February 1, 2009, through May 4, 2009, claimant was unemployed and sustained a 75% work disability. Claimant is entitled to 13.14 weeks of permanent

partial disability benefits for a work disability at the rate of \$316.25 per week, or \$4,155.53.

- From May 5, 2009, through May 19, 2010, claimant was employed by Clearwater Nursing. Claimant sustained a 40.7% wage loss and a 50% task loss for a 45.35% work disability. She is entitled to 54.29 weeks of permanent partial disability payments at the rate of \$316.25 per week, or \$17,169.21.
- From May 20, 2010, through January 31, 2011, claimant was unemployed and is entitled to a 75% work disability. She is entitled to 36.71 weeks of permanent partial disability payments at the rate of \$316.25 per week, or \$11,609.54.
- From February 1, 2011, through March 3, 2011, claimant was employed by Lakepoint and her earnings were more than 90% of her pre-injury wages. During these 4.29 weeks, claimant, based upon her functional impairment, alleges she is entitled to permanent partial disability benefits at the rate of \$316.25 per week, or \$1,356.71. Respondent asserts claimant is not entitled to any permanent partial disability benefits during this time, as claimant already received more than 29.05 weeks of benefits, the maximum to which claimant is entitled for her functional impairment.
- From March 4, 2011, through June 10, 2011, claimant was employed by There's No Place Like Home, Inc. Claimant sustained an 83% wage loss and a 50% task loss for a 66.5% work disability. She is entitled to 14 weeks of permanent partial disability payments at the rate of \$316.25 per week, or \$4,427.50.

### ISSUES

In the April 9, 2013, Award, ALJ Clark found claimant sustained a 7% whole body functional impairment and a 75% work disability (based upon a 50% task loss and a 100% wage loss). The ALJ determined claimant was entitled to receive a total of 311.25 weeks of permanent partial disability benefits.

The parties agree there are two issues for the Board to resolve:

1. From February 1, 2011, through March 3, 2011, when claimant was employed by Lakepoint and her earnings were more than 90% of her pre-injury wages, is she entitled to 4.29 weeks of permanent partial disability benefits, based upon her functional impairment, at the rate of \$316.25 per week, or \$1,356.71?
2. Should the weeks of permanent partial disability payments claimant received for her functional impairment be subtracted from the 311.25 weeks of benefits to which claimant is entitled?

Under claimant's proposed calculation, as of June 11, 2011,<sup>1</sup> claimant is entitled to 143.57 weeks of permanent partial disability benefits (25.43 weeks for functional impairment, or \$6,400.08, plus 118.14 weeks for work disability, or \$37,361.78, which equals 143.57 weeks, or \$43,761.86). However, claimant contends that only the 118.14 weeks of work disability should be subtracted from the maximum 311.25 weeks of permanent partial disability benefits, leaving claimant an additional 193.11 weeks of benefits. Using claimant's calculation, beginning June 11, 2011, claimant would be entitled to 193.11 weeks of permanent partial disability benefits at the rate \$316.25 per week, or a maximum of \$61,071.04. Claimant would be entitled to a total award of \$100,000 in permanent partial disability benefits as \$43,761.86 plus \$61,071.04 exceeds the statutory maximum of \$100,000.

If respondent's calculation were adopted, as of June 11, 2011, claimant would be entitled to 21.14 weeks, or \$5,043.37, of permanent partial disability benefits based upon her functional impairment, plus 118.14 weeks, or \$37,361.78, for her work disability for a total of 139.28 weeks, or \$42,405.15. The 139.28 weeks would then be subtracted from the maximum 311.25 weeks of permanent partial disability benefits, entitling claimant to an additional 171.97 weeks of permanent partial disability benefits at the rate \$316.25 per week, or \$54,385.51. Using this calculation, claimant would be entitled to an award of \$96,790.66 in permanent partial disability benefits (\$42,405.15 plus \$54,385.51 equals \$96,790.66).

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

As stated above, the parties agreed that the ALJ's calculation of claimant's award was not made in accordance with K.S.A. 44-510e.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-510e(a) states in part:

The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

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<sup>1</sup> Claimant testified at the September 18, 2012, regular hearing that she has not worked anywhere since June 10, 2011.

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

In *Wheeler*,<sup>2</sup> Wheeler was injured in February 1994 while working for Boeing. He received medical treatment and was off work, receiving temporary total disability benefits, for 24.5 weeks. Eventually, Wheeler was released to return to work, but by that time, Boeing had eliminated his position. Wheeler pursued a claim against Boeing and received 115.14 weeks of permanent partial disability benefits. Later, Boeing offered Wheeler a position at a comparable wage. After Wheeler returned to work, Boeing filed an application for review and modification of Wheeler's award, asking that the work disability award be modified and Wheeler's benefits for his functional impairment rating be limited.

The ALJ in *Wheeler* entered a modified award, finding that after the date Boeing offered Wheeler a position at a comparable wage, Wheeler was only entitled to benefits based upon a 10.5% functional impairment. The ALJ calculated that Wheeler was entitled to 42.58 weeks of compensation for the functional impairment rating, but gave Boeing credit for the 115.14 weeks of work disability benefits previously paid. Accordingly, the ALJ concluded that Wheeler was not entitled to any further compensation. The Board affirmed the ALJ's calculations and the Kansas Court of Appeals also affirmed, stating:

Although functional impairment and work disability are calculated differently and are designed to compensate for different types of losses, the compensation is still based upon damages caused by *one* work-related injury. An employee is entitled to only one recovery for his work-related injury. The Board's methodology recognizes the one-injury concept by giving the employer credit for the PPD benefits previously paid, whether those benefits were for work disability or functional disability. The amount of benefit does not change when an employee's work

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<sup>2</sup> *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* 266 Kan. 1116 (1999).

disability status changes; the only change under the current statute is the length of time the employee is entitled to receive benefits. Nothing in the 1993 amendments reflects the legislative intent to treat functional impairment and work disability as two separate and independent benefits to which the employee is entitled.<sup>3</sup>

In *Bell*,<sup>4</sup> the Board used a calculation formula approved by the Kansas Court of Appeals in *Wheeler* and stated:

There are several possible methods for calculating the award when there is a change in the disability rate. After considering the various options, the Board concluded the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* 266 Kan. 1116 (1999).

The Board recently reaffirmed the aforementioned method of calculating permanent partial disability benefits in *Juett*<sup>5</sup> and *Rivera-Garay*.<sup>6</sup>

As stated by the Kansas Court of Appeals in *Wheeler*, although claimant's functional impairment and work disability are calculated differently and are designed to compensate for different types of losses, the compensation is still based upon damages caused by one work-related injury. Relying on *Wheeler*, the Board finds claimant is not entitled to permanent partial disability benefits from February 1, 2011, through March 3, 2011. During

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<sup>3</sup> *Id.* at 636-637.

<sup>4</sup> *Bell v. Boeing Company*, No. 239,082, 2003 WL 1918538 (Kan. WCAB Mar. 31, 2003).

<sup>5</sup> *Juett v. State of Kansas*, Nos. 241,926, 1,034,321 & 1,042,037, 2012 WL 369763 (Kan. WCAB Jan. 10, 2012).

<sup>6</sup> *Rivera-Garay v. McCrite Plaza Retirement Comm*, No. 1,000,191, 2010 WL 517308 (Kan. WCAB Jan. 29, 2010).

that time period, claimant was employed by Lakepoint and her earnings were more than 90% of her pre-injury wages and she was not entitled to a work disability. Prior to February 1, 2011, claimant was entitled to 104.14 weeks of permanent partial disability benefits based upon work disability, which exceeded the maximum 29.05 weeks of permanent partial disability benefits to which claimant was entitled for her 7% whole body functional impairment.

Also relying on *Wheeler*, the Board finds that the number of weeks of permanent partial disability benefits due and owing claimant for both functional impairment and work disability prior to June 11, 2011, should be subtracted from 311.25 weeks of benefits to which claimant is entitled. Thus, commencing June 11, 2011, claimant would be entitled to an additional 171.97 weeks (311.25 minus 139.28 equals 171.97) of permanent partial disability benefits at the rate \$316.25 per week, or \$54,385.51.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>7</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the April 9, 2013, Award entered by ALJ Clark as follows:

Commencing September 4, 2008, through January 31, 2009, based upon her 7% whole body functional impairment, claimant is entitled to 21.14 weeks of permanent partial disability benefits at the rate of \$238.57<sup>8</sup> per week, or \$5,043.37; commencing February 1, 2009, through May 4, 2009, claimant is entitled to 13.14 weeks of permanent partial disability benefits at the rate of \$316.25<sup>9</sup> per week, or \$4,155.53, for a 75% work disability; commencing May 5, 2009, through May 19, 2010, claimant is entitled to 54.29 weeks of permanent partial disability payments at the rate of \$316.25 per week, or \$17,169.21, for a 45.35% work disability; commencing May 20, 2010, through January 31, 2011, claimant is entitled to 36.71 weeks of permanent partial disability payments at the rate of \$316.25 per week, or \$11,609.54, for a 75% work disability; commencing February 1, 2011, through March 3, 2011, claimant is entitled to no permanent partial disability benefits; commencing March 4, 2011, through June 10, 2011, claimant is entitled to 14 weeks of permanent

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<sup>7</sup> K.S.A. 2012 Supp. 44-555c(k).

<sup>8</sup> The compensation rate of \$238.57 is based upon claimant's average weekly wage without fringe benefits, which is \$357.84.

<sup>9</sup> The compensation rate of \$316.25 is based upon claimant's average weekly wage with fringe benefits, which is \$474.35.

partial disability payments at the rate of \$316.25 per week, or \$4,427.50, for a 66.5% work disability; commencing June 11, 2011, claimant is entitled to 171.97 weeks of permanent partial disability payments at the rate of \$316.25 per week, or \$54,385.51, for a 75% work disability. The total award is \$96,790.66.

As of October 15, 2013, claimant is due and owing \$81,167.91, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$15,622.75 shall be paid at \$316.25 per week until paid or until further order of the Director.

Should claimant's counsel desire attorney fees be approved in this matter, he may submit that matter to the ALJ.

All other findings, conclusions and orders contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
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Honorable John D. Clark, Administrative Law Judge